



No. 72-1371

Supreme Court, U. S.  
FILED

SEP 26

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973

---

DONALD C. ALEXANDER,  
COMMISSIONER OF INTERNAL REVENUE,  
*Petitioner,*

v.

"AMERICANS UNITED" INC., ETC., *ET AL.*,  
*Respondent.*

---

On Writ of *Certiorari* to The United States  
Court of Appeals for The District of Columbia Circuit

---

**BRIEF *AMICUS CURIAE* FOR TAX ANALYSTS AND  
ADVOCATES IN SUPPORT OF RESPONDENT**

---

THOMAS F. FIELD  
732 17th Street, N.W.  
Washington, D.C. 20006  
*Attorney for Tax Analysts  
and Advocates*

September, 1973

---



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973

---

**No. 72-1371**

---

DONALD C. ALEXANDER,  
COMMISSIONER OF INTERNAL REVENUE,  
*Petitioner,*

v.

"AMERICANS UNITED" INC., ETC., *ET AL.*,  
*Respondent.*

---

On Writ of *Certiorari* to The United States  
Court of Appeals for The District of Columbia Circuit

---

**BRIEF FOR TAX ANALYSTS AND ADVOCATES  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

---

**QUESTIONS DISCUSSED BY *AMICUS***

Unlike "Americans United" (respondent), *Amicus* has maintained its status under the Internal Revenue Code as a Section 501(c)(3) organization and its eligibility to receive deductible

contributions. *Amicus* has determined not to jeopardize this status and has refrained from all legislative activities. *Amicus* has initiated a suit, presently pending in Federal District Court, in which it seeks to have declared unconstitutional the restrictions on legislative activities of Section 501(c)(3) organizations and to have Treasury officials enjoined from continued enforcement of those restrictions. The questions discussed by *Amicus* are:

1. If this Court determines that an organization which has lost its Section 501(c)(3) status for having allegedly engaged in substantial legislative activities is barred from seeking declaratory or injunctive relief concerning the constitutionality of limitations on its legislative activities, should such a determination be circumscribed so as not to bar *Amicus*, which still maintains 501(c)(3) status, from litigating its suit since it is currently unable to cast its challenge in the form of a refund suit?

2. Is an organization currently classified under Section 501(c)(3) required to engage in substantial legislative activities and thereby jeopardize its current tax status to be able to challenge the restrictions on such activities?

Written consent has been obtained from counsel for each party for the filing of this brief *amicus curiae*. The letters containing these consents are on file with the Clerk of this Court.

#### I. INTEREST OF *AMICUS CURIAE*

Tax Analysts and Advocates (TA/A) was incorporated on July 14, 1970, under the District of Columbia Non-Profit Corporation Act. Its organizational purposes are to improve public understanding of the Federal tax system,

and to improve the administration of the tax laws by conducting a public interest tax law practice. On March 23, 1971, the Internal Revenue Service ruled that TA/A was exempt from income tax as an organization within the scope of Section 501(c)(3) of the Internal Revenue Code (Code), and that contributions to the group were deductible for Federal income tax purposes under Section 170(c)(2) of the Code. TA/A is exempt from paying social security and federal unemployment taxes under Sections 3121(b)(8)(B) and 3306(c)(8) of the Code respectively.

In order to be certain that TA/A will retain this status, and avoid a substantial loss of contributions similar to that which respondent has suffered as a result of its loss of these vital rulings, TA/A has refrained entirely from "carrying on propaganda, or otherwise attempting, to influence legislation" although it needs to engage in such activities to carry out its charitable purposes. The Internal Revenue Service has stated that no audit or other administrative action has been brought or is pending which would threaten either the status of TA/A as an exempt organization under Section 501(c)(3) or the ruling that contributions to TA/A are deductible.

On April 30, 1973, TA/A (and co-plaintiff Taxation With Representation) filed suit in the District Court for the District of Columbia to have declared unconstitutional the restrictions on legislative activity in Sections 170(c)(2) and 501(c)(3) and to enjoin Treasury Department officials from the continued enforcement of those restrictions and of all applicable regulations and rulings thereunder. In that litigation, TA/A has alleged numerous grounds for relief. It has argued that these Code restrictions on legislative activities abridge TA/A's First Amendment freedoms of speech, association, and press, and right of petition, by conditioning eligibility for deductible contributions and for tax exemption

upon the surrender of these rights. TA/A also has alleged that these restrictions deny it equal protection of the laws and are unconstitutionally vague. The defendants in that case have filed a motion to dismiss asserting the same jurisdictional objections as those at issue here: the alleged statutory bars to relief in the Anti-Injunction Act, 26 U.S.C. 7421, and the Declaratory Judgment Act, 28 U.S.C. 2201, as well as the assertion of the application of the doctrine of sovereign immunity.

Several positions taken in petitioner's brief, if adopted by this Court, would severely prejudice the TA/A litigation. These positions are incorrect interpretations of the relevant law and precedent, and TA/A strongly urges the Court to reject them.

Specifically, TA/A urges the Court to reject petitioner's arguments: (a) that the scope of the Anti-Injunction Act is so broad as to bar, in addition to respondent's action, all of the suits enumerated on pages 32 and 33 of petitioner's brief including *Tax Analysts and Advocates v. Shultz* (D.D.C., No. 833-73) (Petitioner's brief, pp. 31-34); (b) that the Declaratory Judgment Act has a broader application than the Anti-Injunction Act so as to preclude all litigation seeking declaratory judgments and involving the interpretation and application of the Internal Revenue Code except refund and Tax Court litigation (Petitioner's brief, pp. 37-42); (c) that respondent's suit is barred by the doctrine of sovereign immunity (Petitioner's brief, pp. 42-48); and (d) that the constitutional questions raised by respondent do not justify the convening of a three-judge court (Petitioner's brief, pp. 49-56).

However, since counsel for respondent has fully briefed these issues, TA/A will confine its comments solely to the factual distinction between the tax status of respondent and that of

TA/A, and the ramifications that flow therefrom. While respondent has been reclassified by the IRS from 501(c)(3) to 501(c)(4) status, TA/A continuously has maintained its 501(c)(3) status. Thus, whereas petitioner has argued that the constitutional issues raised by respondent could have been litigated in the context of a refund suit for unemployment taxes paid by respondent or a refund suit brought by a "friendly donor" of funds to respondent (Petitioner's brief, pp. 34-37), *no similar legal remedies are available to TA/A pursuant to which its allegations can be adjudicated.*

TA/A wishes to make this distinction and its ramifications clear because if the Court were to determine that the Anti-Injunction Act and/or the Declaratory Judgment Act barred respondent's suit on the ground that it had adequate available remedies at law in the nature of alternative refund suits, the Court might inadvertently state or imply in its decision that a charity only can litigate the constitutionality of limitations on its activities or the deductibility of contributions made to it in the form of a refund suit. The adoption of such a position would severely prejudice the lawsuit of *Amicus* which seeks declaratory and injunctive relief from the Federal District Court and which is not in a position to bring either of the aforementioned refund suits.

## II. ARGUMENT

The adoption of such a position is unwarranted for two reasons. First, neither of the refund suits suggested by petitioner for respondent, even if found to be adequate for respondent, could be theoretically availed of by TA/A in view of its present classification as a Section 501(c)(3) organization. Second, in order to challenge the constitutionality of the restrictions on legislative activity, TA/A should not be required to engage in substantial legislative activity

so as to lose its status as a 501(c)(3) group, and then bring a refund suit.

Both legal remedies argued by petitioner to be adequate for respondent—a refund suit for unemployment taxes and a “friendly donor” refund suit—are dependent upon the loss by an organization of its status under Section 501(c)(3). By contrast, TA/A has continuously been classified as a 501(c)(3) organization, and it cannot sue for a refund of social security or unemployment taxes because it has paid none. Nor can its donors sue for a refund by alleging that their contributions should have been deductible charitable contributions—since all contributions to TA/A already can be deducted as charitable contributions.

Therefore, to the extent the petitioner’s argument that the Anti-Injunction Act and Declaratory Judgment Act are jurisdictional bars to respondent’s suit depends upon the contention that the respondent had viable legal remedies, these statutory provisions should not bar the TA/A suit to challenge the statutory limitations on its own legislative activities. Moreover, under established principles of law, TA/A should not be required to engage in substantial legislative activities and thus lose its exempt status, or be reclassified like respondent as a 501(c)(4) organization, in order to be able to bring the types of refund suits argued by petitioner to be adequate remedies at law.

In recent years, this Court has continuously upheld the principle that to present a “case or controversy” within the requirement of Article III of the Constitution, a plaintiff need not first violate an allegedly unconstitutional civil law and incur financial or other civil penalties. Specifically, where the Government conditions a license or benefit on forbearance from a constitutionally protected

activity, a plaintiff may litigate the constitutionality of the condition without first having to engage in the activities and subsequently be penalized for having accepted the license or benefit.

A representative recent example of the application of this principle is *Civil Service Commission v. National Association of Letter Carriers*, 41 U.S.L. Week 5122 (U.S. June 25, 1973). Federal employees were among the plaintiffs in this case who sued to have the "Hatch Act" restrictions on partisan politics declared unconstitutional, asserting that a government benefit—federal employment—was conditioned upon forbearance from various protected First Amendment rights inherent in partisan political acts. Only one of the employees already had engaged in partisan politics while in federal service—the penalties for which were exclusively civil, ranging from dismissal to thirty days suspension without pay. Although this Court found on the substantive question that the Hatch Act prohibitions were constitutional, none of the Justices indicated any reservations about the existence of a justiciable case or controversy with respect to any of the employees.

For additional recent cases illustrative of the same principle see: *Keyishian v. Board of Regents*, 385 U.S. 589 (1969), (loyalty oath for government employment is challengeable without first having to be taken); *Kent v. Dulles*, 357 U.S. 116 (1958); *Baird v. State Bar*, 401 U.S. 1 (1971); *Konigsberg v. State Bar*, 353 U.S. 252 (1957), (passport and bar admission application questions may be challenged without having to be answered); *Healy v. James*, 408 U.S. 169 (1972), (prior restraints on the use of campus facilities may be challenged without first having to use them).

So, here, TA/A is not required to engage in substantial legislative activities and lose its current tax exempt status

before it can litigate the constitutionality of the restrictions on such activities.

### III. CONCLUSION

*Amicus* urges this Court to find that there are no jurisdictional bars to respondent's suit. However, if the Court determines that respondent is barred from declaratory or injunctive relief because it has adequate available remedies at law in the form of alternative refund suits, the Court should make clear that such a determination would not apply to bar *Amicus*, which still maintains its Section 501(c)(3) status, from obtaining the injunctive and declarative relief it is now seeking in the Federal District Court for the District of Columbia.

Respectfully submitted,

THOMAS F. FIELD

732 17th Street, N.W.

Washington, D.C. 20006

*Attorney for Amicus Curiae*

September, 1973

